

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CARLTON JOHNSON,

Defendant-Appellant.

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UNPUBLISHED

February 26, 1999

No. 203321

Recorder's Court

LC No. 96-003870

Before: Markman, P.J., and Jansen and J. B. Sullivan\*, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of first-degree premeditated murder, MCL 750.316; MSA 28.548, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to the mandatory terms of two years in prison for the felony-firearm conviction and life without parole for the first-degree murder conviction, the sentences to run consecutively. We affirm.

Defendant's first issue on appeal is that there was insufficient evidence to convict him of first-degree premeditated murder because there was no evidence of premeditation and deliberation. Defendant alleges that he killed the victim in the heat of passion or after a sudden impulse because the victim had, over four years prior, killed defendant's brother. Consequently, defendant claims his killing of the victim was not an act committed after premeditation and deliberation.

To establish first-degree murder, the prosecutor must prove beyond a reasonable doubt that the defendant intentionally killed the victim and that the act of killing was deliberate and premeditated. *People v Haywood*, 209 Mich App 217, 229; 530 NW2d 497 (1995). Although the length of time needed to weigh the choice before it is made is incapable of precise determination, there must be an interval during which a "second look" may be contemplated. *People v Furman*, 158 Mich App 302, 308; 404 NW2d 246 (1987). Premeditation and deliberation may be inferred from the circumstances surrounding the killing. *People v Wofford*, 196 Mich App 275, 278; 492 NW2d 747 (1992). A partial list of factors that may be considered by the trier of fact to determine if the defendant

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\* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

premeditated and deliberated prior to killing the victim include: (1) the existence of a previous relationship between the defendant and the victim; (2) the defendant's actions before and after the killing; (3) the circumstances surrounding the killing itself, including the use of a gun and the wounds inflicted. *People v Coddington*, 188 Mich App 584, 600; 470 NW2d 478 (1991).

Viewing the evidence in a light most favorable to the prosecution, there was sufficient evidence to establish the elements of premeditation and deliberation. *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995). The evidence indicates that defendant, who lived on Hayden Street, saw the victim standing on the front porch of a house also on Hayden Street, proceeded to detour from his route, walked to the house where he saw the victim, approached the front porch of the house using a private walkway, aimed his gun at the victim, spoke to the victim saying, "[Y]ou don't know me do you," and then opened fire, shooting four to six bullets in the victim's direction. Defendant's explanation to police for the shooting was that it was in retaliation against the victim because the victim had killed defendant's brother four years earlier.

A reasonable trier of fact could have found that defendant's killing of the victim was premeditated and deliberate. Defendant saw the victim from some distance away, gapped the distance, approached within feet of the victim, and, in effect, ambushed the unarmed, non-confrontational victim by firing several bullets at him. Defendant then followed the victim into the street, engaged in a struggle with the victim, and shot the victim fatally in the abdomen. There had been no confrontation or exchange of words between the victim and defendant before defendant's pursuit and shooting of the victim. Defendant had the opportunity to take a "second look" and abandon his objective to kill the victim. A "revenge" killing is not within the contemplation of the "hot blood" standard which distinguishes first-degree murder from voluntary manslaughter. *People v Hess*, 214 Mich App 33, 38; 543 NW2d 332 (1995). Thus, there was sufficient evidence to permit a rational trier of fact to conclude beyond a reasonable doubt that defendant's killing of the victim was premeditated and deliberate.

Defendant's second issue on appeal is that the trial court abused its discretion in failing to grant a motion for a mistrial following the testimony of police officer Buffington. The disputed testimony of police officer Buffington involves an independently recollected statement allegedly made by defendant which was that defendant got his revenge and his brother could now rest in peace.

The grant or denial of a motion for a mistrial rests within the sound discretion of the trial court. *People v Wolverton*, 227 Mich App 72, 75; 574 NW2d 703 (1997). An abuse of that discretion will be found only where the trial court's denial of the motion has deprived the defendant of a fair and impartial trial. *Id.*

Although the disputed statement that was alleged to have been made by defendant was not written in his report, police officer Buffington's report did contain a substantially similar statement attributed to defendant, which was: "I smoked that mother fucker because he shot and killed my brother four years ago." In substance, the disputed statement indicates that defendant killed the victim for revenge. As the trial court stated, the undisputed statement indicates the same "revenge" motive. Consequently, this sentiment was already before the jury. Furthermore, defendant's written statement

made to the police after his arrest also included the same “revenge” explanation for defendant shooting the victim: “Because he killed my brother four years ago and only spent four years in prison. I wanted him to know who I was and why I shot him.”

A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial. *People v Cunningham*, 215 Mich App 652, 654; 546 NW2d 715 (1996). Defendant was not deprived of a fair trial as a consequence of police officer Buffington’s independently recollected testimony because the substance of the disputed testimony was before the jury through other admissible evidence. The trial court did not abuse its discretion when it denied defendant’s motion for a mistrial.

Affirmed.

/s/ Stephen J. Markman

/s/ Kathleen Jansen

/s/ Joseph B. Sullivan